

November 2004

MJI Publication Updates

Adoption Proceedings Benchbook

**Child Protective Proceedings Benchbook
(Revised Edition)**

**Criminal Procedure Monograph 2—
Issuance of Search Warrants (Revised
Edition)**

**Criminal Procedure Monograph 3—
Misdemeanor Arraignments & Pleas
(Revised Edition)**

**Criminal Procedure Monograph 6—Pretrial
Motions (Revised Edition)**

Sexual Assault Benchbook

**Traffic Benchbook—Revised Edition,
Volume 1**

Update: Adoption Proceedings Benchbook

CHAPTER 2

Freeing a Child for Adoption

2.13 Termination Pursuant to a Step-Parent Adoption

B. Case Law Interpreting MCL 710.51(6)

On page 62 insert the following case summary before the summary of *In re Martyn*:

♦ *In re Eickhoff*, ___ Mich App ___ (2004)

The mother's parental rights were terminated pursuant to MCL 710.51(6). On appeal, the mother claimed that the trial court's finding that she regularly and substantially failed or neglected to visit, contact, or communicate with the child was erroneous because the father prevented her from having regular contact with the child. The Court upheld the termination of parental rights and distinguished this case from *In re ALZ*, 247 Mich App 264 (2001), because in this case the mother had visitation rights ordered in the divorce decree but she did not seek assistance from the Friend of the Court or the divorce court to enforce those rights.

The mother also claimed that the trial court erred by looking at her ability to pay support when the divorce decree indicated that support was "reserved." The Court of Appeals acknowledged that it had previously held that a trial court considering an adoption petition under MCL 710.51(6) cannot look at the parent's ability to pay when a support order exists. However, the Court of Appeals distinguished this case from one in which a parent has been ordered to pay a specific amount, and the trial court ignores that order and relitigates a parent's ability to pay. The Court stated:

"In reviewing both the statutory language and the pertinent published decisions, we also conclude that the relevant sections of MCL 710.51(6) are essentially yardsticks to be used to measure the noncustodial parent's interest in being a parent as it pertains to permitting termination of his/her parental rights. But, to be an

effective yardstick, the test must measure something; therefore, if an order *reserving or holding in abeyance* the establishment of a sum of money for support is a ‘support order’ within the meaning of the second clause of subsection 6(a), that measure is meaningless. . . . Thus, we find that the plain language of the provision of the divorce decree in the instant case pertaining to support and the use of common sense require a conclusion that respondent was not ordered to pay child support. Indeed, the court ‘reserved’ the issue for another time because at the time of the divorce decree respondent was unemployed. Consequently, because the court *did not set forth some sum of money that respondent* was required to pay for child support, there is no support order in place *under the circumstances of this case*, and the trial court properly inquired as to respondent’s ability to support her child under the first clause of subsection 6(a).” ___ Mich App at ___. (Emphasis in original.)

CHAPTER 2

Freeing a Child for Adoption

2.16 Special Notice Provisions for Incarcerated Parties

On page 70, at the end of the first paragraph in this section, insert the following text:

MCR 2.004(A) states that it applies to one of the specifically enumerated actions “in which a party is incarcerated under the jurisdiction of the Department of Corrections.” In *In re Davis*, ___ Mich App ___, ___ (2004), the Court indicated that “Department of Corrections” refers only to the Michigan Department of Corrections. Therefore, MCR 2.004 does not apply to parties incarcerated in another state who are not subject to the jurisdiction of the Michigan Department of Corrections.

Update: Child Protective Proceedings Benchbook (Revised Edition)

CHAPTER 5

Notice & Time Requirements

5.7 Special Notice Provisions for Incarcerated Parties

Near the middle of page 140, after the quotation of MCR 2.004(A)(1)–(2), insert the following text:

Applicability.

MCR 2.004(A) states that it applies to one of the specifically enumerated actions “in which a party is incarcerated under the jurisdiction of the Department of Corrections.” In *In re Davis*, ___ Mich App ___, ___ (2004), the Court indicated that “Department of Corrections” refers only to the Michigan Department of Corrections. Therefore, MCR 2.004 does not apply to parties incarcerated in another state who are not subject to the jurisdiction of the Michigan Department of Corrections.

Update: Criminal Procedure Monograph 2—Issuance of Search Warrants (Revised Edition)

Part A — Commentary

2.13 The Exclusionary Rule and Good Faith Exception

Add the following case summary to the July 2003 and August 2004 updates to page 25:

As adopted by the Michigan Supreme Court in *People v Goldston*, 470 Mich 523 (2004), “[t]he ‘good faith’ exception [to the exclusionary rule] renders evidence seized pursuant to an invalid search warrant admissible as substantive evidence in criminal proceedings where the police acted in reasonable reliance on a presumptively valid search warrant that was later declared invalid [internal citation omitted].” *People v Hellstrom*, ___ Mich App ___, ___ (2004). Without deciding whether the search warrant in *Hellstrom* was valid, the Court of Appeals applied the good-faith exception to evidence seized by police officers pursuant to a warrant based on a magistrate’s probable cause determination. *Hellstrom, supra* at ___.

In *Hellstrom*, two minor females accused the defendant of sexually assaulting them in the defendant’s home. On the basis of these allegations and an officer’s experience that suspects accused of assaulting young females “use [] pornography for sexual gratification” and “are known to have items of sexual gratification inside their homes, computers and other devices,” the police officer obtained a search warrant for the defendant’s home. *Hellstrom, supra* at ___. The warrant described with particularity the place to be searched and the items to be seized if discovered during the search. The defendant argued that the search warrant was invalid because (1) it was not based on probable cause and (2) it was a “general” warrant that failed to fetter the police officers’ discretion in seizing evidence. *Hellstrom, supra* at ___.

The *Hellstrom* Court affirmed the trial court’s denial of the defendant’s motion to suppress, not for the trial court’s expressed reason—that the warrant was supported by probable cause and was not overly broad—but because the purpose of the exclusionary rule would not be furthered by excluding

evidence obtained by a police officer's objectively reasonable reliance on the validity of the warrant. *Hellstrom, supra* at _____. The Court concluded

“that the officers conducting the search of defendant’s home acted in good-faith reliance on the magistrate’s probable cause and technical sufficiency determinations regarding the search warrants. The supporting affidavits were not ‘so lacking in indicia of probable cause’ as to say that the officers could not objectively believe that the warrant was supported by probable cause. And there is no reason to believe the facts alleged in the affidavit were false or that the magistrate was misled by false information. Also, although there were no allegations in the affidavit that defendant had videotaped or taken pictures of the complainants, it did assert that the crimes happened in defendant’s residence. Given the affiant’s knowledge that pedophiles generally possess pornographic images for sexual gratification, it was not ‘entirely unreasonable’ to believe that evidence of a crime would be found in defendant’s home, whether it be images taken of the complainants without their knowledge or possession of other material that would constitute child pornography [internal citations and footnote omitted].” *Hellstrom, supra* at _____.

Update: Criminal Procedure Monograph 3—Misdemeanor Arraignments & Pleas (Revised Edition)

Part B—Commentary on Pleas

3.38 Withdrawing or Challenging a Plea

Insert the following case summary after the third paragraph near the middle of page 64:

“In the interest of justice” and “substantial prejudice.”

Doubt about the veracity of a defendant’s nolo contendere plea, by itself, is not an appropriate reason to permit the defendant to withdraw an accepted plea before sentencing. *People v Patmore*, ___ Mich App ___, ___ (2004). In *Patmore*, the defendant moved to withdraw his no contest plea on the basis that the complainant had recanted her preliminary examination testimony on which the defendant’s plea was based.

A defendant who wishes to withdraw his no contest plea before sentencing must comply with the requirements of MCR 6.310(B). Unless claiming an error in the plea proceeding itself, the defendant has the burden of showing that withdrawal of the plea is in the interest of justice; that is, the defendant must show that there is a fair and just reason for withdrawal. MCR 6.310(B); *Patmore*, *supra* at ___. If the defendant satisfies this burden, then the prosecution must establish that substantial prejudice would result if the defendant was permitted to withdraw his plea. The *Patmore* Court explained:

“In keeping with this standard, we believe that for recanted testimony, which provided a substantial part of the factual basis underlying a defendant’s no-contest plea, to constitute a fair and just reason for allowing the defendant to withdraw his plea, at a minimum, the defendant must prove by a preponderance of credible evidence that the original testimony was indeed untruthful. If the defendant meets this burden, the trial court must then determine whether other evidence is sufficient to support the

factual basis of the defendant's plea. If the defendant fails to meet this burden or if other evidence is sufficient to support the plea, then the defendant has not presented a fair and just reason to warrant withdrawal of his no-contest plea. Even if the defendant presents such a fair and just reason, prejudice to the prosecution must still be considered by the trial court [internal citations omitted]." *Patmore, supra* at ____.

Because no Michigan case law involved the circumstances presented in *Patmore* (recanted testimony in the context of a defendant's motion to withdraw a nolo contendere plea), the Court of Appeals noted that recanted testimony in the context of a defendant's motion for new trial is generally regarded with suspicion and considered untrustworthy. *Patmore, supra* at _____. In the context of a new trial, a defendant would be required to establish either the veracity of the witness' recanted testimony or the falsity of the witness' initial testimony. *Patmore, supra* at _____. The *Patmore* Court concluded that recanted testimony in both contexts—motions for new trial and motions to withdraw a plea—should be similarly viewed.

In *Patmore*, the defendant argued that the witness' preliminary examination testimony against him was the result of coercion. He claimed that the witness was threatened with losing custody of her child if she did not testify against the defendant. The Court of Appeals reversed the trial court's decision allowing the defendant to withdraw his plea because the defendant

"failed to prove by a preponderance of credible evidence that [the complainant]'s preliminary examination testimony was untruthful, particularly given [the police officer]'s preliminary examination testimony which clearly supported [the complainant]'s original description of the offense and defendant's intent." *Patmore, supra* at ____.

Update: Criminal Procedure Monograph 6—Pretrial Motions (Revised Edition)

Part 2—Individual Motions

6.29 Motion to Withdraw Guilty Plea

Insert the following case summary at the bottom of page 66:

Doubt about the veracity of a defendant's nolo contendere plea, by itself, is not an appropriate reason to permit the defendant to withdraw an accepted plea before sentencing. *People v Patmore*, ___ Mich App ___, ___ (2004). In *Patmore*, the defendant moved to withdraw his no contest plea on the basis that the complainant had recanted her preliminary examination testimony on which the defendant's plea was based.

A defendant who wishes to withdraw his no contest plea before sentencing must comply with the requirements of MCR 6.310(B). Unless claiming an error in the plea proceeding itself, the defendant has the burden of showing that withdrawal of the plea is in the interest of justice; that is, the defendant must show that there is a fair and just reason for withdrawal. MCR 6.310(B); *Patmore, supra* at ___. If the defendant satisfies this burden, then the prosecution must establish that substantial prejudice would result if the defendant was permitted to withdraw his plea. The *Patmore* Court explained:

“In keeping with this standard, we believe that for recanted testimony, which provided a substantial part of the factual basis underlying a defendant's no-contest plea, to constitute a fair and just reason for allowing the defendant to withdraw his plea, at a minimum, the defendant must prove by a preponderance of credible evidence that the original testimony was indeed untruthful. If the defendant meets this burden, the trial court must then determine whether other evidence is sufficient to support the factual basis of the defendant's plea. If the defendant fails to meet this burden or if other evidence is sufficient to support the plea, then the defendant has not presented a fair and just reason to warrant withdrawal of his no-contest plea. Even if the defendant presents such a fair and just reason, prejudice to the prosecution

must still be considered by the trial court [internal citations omitted].” *Patmore, supra* at ____.

Because no Michigan case law involved the circumstances presented in *Patmore* (recanted testimony in the context of a defendant’s motion to withdraw a nolo contendere plea), the Court of Appeals noted that recanted testimony in the context of a defendant’s motion for new trial is generally regarded with suspicion and considered untrustworthy. *Patmore, supra* at _____. In the context of a new trial, a defendant would be required to establish either the veracity of the witness’ recanted testimony or the falsity of the witness’ initial testimony. *Patmore, supra* at _____. The *Patmore* Court concluded that recanted testimony in both contexts—motions for new trial and motions to withdraw a plea—should be similarly viewed.

In *Patmore*, the defendant argued that the witness’ preliminary examination testimony against him was the result of coercion. He claimed that the witness was threatened with losing custody of her child if she did not testify against the defendant. The Court of Appeals reversed the trial court’s decision allowing the defendant to withdraw his plea because the defendant

“failed to prove by a preponderance of credible evidence that [the complainant]’s preliminary examination testimony was untruthful, particularly given [the police officer]’s preliminary examination testimony which clearly supported [the complainant]’s original description of the offense and defendant’s intent.” *Patmore, supra* at ____.

6.36 Motion to Suppress Evidence Seized Pursuant to a Defective Search Warrant

Insert the following case summary before Section 6.37 on page 87:

As adopted by the Michigan Supreme Court in *People v Goldston*, 470 Mich 523 (2004), “[t]he ‘good faith’ exception [to the exclusionary rule] renders evidence seized pursuant to an invalid search warrant admissible as substantive evidence in criminal proceedings where the police acted in reasonable reliance on a presumptively valid search warrant that was later declared invalid [internal citation omitted].” *People v Hellstrom*, ___ Mich App ___, ___ (2004). Without deciding whether the search warrant in *Hellstrom* was valid, the Court of Appeals applied the good-faith exception to evidence seized by police officers pursuant to a warrant based on a magistrate’s probable cause determination. *Hellstrom, supra* at ___.

In *Hellstrom*, two minor females accused the defendant of sexually assaulting them in the defendant’s home. On the basis of these allegations and an officer’s experience that suspects accused of assaulting young females “use [] pornography for sexual gratification” and “are known to have items of sexual gratification inside their homes, computers and other devices,” the police officer obtained a search warrant for the defendant’s home. *Hellstrom, supra* at ___. The warrant described with particularity the place to be searched and the items to be seized if discovered during the search. The defendant argued that the search warrant was invalid because (1) it was not based on probable cause and (2) it was a “general” warrant that failed to fetter the police officers’ discretion in seizing evidence. *Hellstrom, supra* at ___.

The *Hellstrom* Court affirmed the trial court’s denial of the defendant’s motion to suppress, not for the trial court’s expressed reason—that the warrant was supported by probable cause and was not overly broad—but because the purpose of the exclusionary rule would not be furthered by excluding evidence obtained by a police officer’s objectively reasonable reliance on the validity of the warrant. *Hellstrom, supra* at ___. The Court concluded

“that the officers conducting the search of defendant’s home acted in good-faith reliance on the magistrate’s probable cause and technical sufficiency determinations regarding the search warrants. The supporting affidavits were not ‘so lacking in indicia of probable cause’ as to say that the officers could not objectively believe that the warrant was supported by probable cause. And there is no reason to believe the facts alleged in the affidavit were false or that the magistrate was misled by false information. Also, although there were no allegations in the affidavit that defendant had videotaped or taken pictures of the complainants, it did assert that the crimes happened in defendant’s residence. Given the affiant’s knowledge that pedophiles generally possess pornographic images for sexual gratification, it was not ‘entirely unreasonable’ to believe that evidence of a crime would be found

in defendant's home, whether it be images taken of the complainants without their knowledge or possession of other material that would constitute child pornography [internal citations and footnote omitted]." *Hellstrom, supra* at ____.

6.37 Motion to Suppress Evidence Seized Without a Search Warrant

2. Searches Incident to Valid Arrest

Insert the following text near the bottom of page 90, immediately before the beginning of subsection 3:

Evidence was properly seized and admitted at trial against the defendant when it was discovered during a police officer's lawful investigatory detention of the defendant. *People v Dunbar*, ___ Mich App ___, ___ (2004). In *Dunbar*, a police officer was justified in stopping the defendant based on information received from a reliable confidential informant. During the investigatory stop, the officer discovered and seized one bag of marijuana and one bag of crack cocaine defendant held in his left hand when he complied with the officer's order to remove his hand from his pocket. *Dunbar, supra* at ___.

An investigatory stop, as in *Terry*, may be justified by an unverified tip from a known informant. *Dunbar, supra* at ___. In *Dunbar*, the investigatory stop was based on information given to a police officer that the defendant possessed cocaine. The police officer testified to three previous occasions on which the informant's information had been reliable. The officer found the defendant at the location the informant provided and observed the informant and the defendant together at that location before stopping the defendant. According to the *Dunbar* Court:

“[W]hen an investigatory stop is based, at least in part, on information from an informant, the critical inquiry remains whether the officer's suspicion was reasonable when considered in light of the totality of circumstances. [Internal citation omitted.]

* * *

“Based on these facts, we find that the trial court did not clearly err in concluding that there was sufficient indicia of reliability to provide the police with reasonable suspicion that defendant had just been involved in criminal activity, which justified the forcible stop.” *Dunbar, supra* at ___.

November 2004

Update: Sexual Assault Benchbook

CHAPTER 3

Other Related Offenses

3.11 Dissemination of Sexually Explicit Matter to Minors

Insert the following note on page 144 after the January 2004 update:

Note: In *Athenaco, Ltd v Cox*, ___ F Supp 2d ___, ___ (ED Mich, 2004), the Court upheld the January 1, 2004 amendments to MCL 722.671 et seq. The plaintiffs in that case challenged the constitutionality of the amendments. The Court held that the “Act, 2003 Mich. Public Act 192, M.C.L. §§ 722.671 (a), (b) and (e), 722.675 and 722.677 . . . is neither vague nor overbroad. As such, Defendants are entitled to summary judgment on the Act’s constitutional validity.”

CHAPTER 7

General Evidence

7.3 Evidence of Other Crimes, Wrongs, or Acts

C. Admissibility of “Other-Acts” Evidence in Cases Involving Sexual Assault

Insert the following case summary on page 338 before the summary of *People v Ortiz*:

♦ *People v Drohan*, ___ Mich App ___ (2004):

The defendant was convicted of CSC III and CSC IV against a former coworker. At trial, the victim testified that the defendant rubbed the victim’s breast and grabbed her wrist and made her touch his crotch on several occasions. She also testified that he forced her into the passenger seat of a car and forced her to perform oral sex on him. The defendant argued that it was consensual sexual contact. At trial, another witness testified that on a previous occasion the defendant had grabbed her breast and grabbed her arm and tried to get her to touch his exposed penis. A third witness testified that she went to a party at the defendant’s house. She indicated that she was sleeping in the children’s room and when she woke up the defendant’s “hands were on [her] buttocks and he was playing with himself.” The trial court admitted the testimony regarding the defendant’s former acts because it was “relevant to show the existence of a scheme, plan, or method by which the defendant accomplished the sexual assault in that consent is an issue, therefore, showing a scheme, plan, or method by which he non-consentually [sic] engages in sexual assault with women is relevant to this trial.” On appeal, the defendant argued that the trial court erred in admitting this testimony. The Court of Appeals held that the evidence was introduced for a proper purpose because each of the incidents had “common features” that allowed the inference “that defendant had a common scheme of suddenly grabbing unwilling women and seeking immediate sexual gratification from them.” The Court also found that the evidence was relevant, and the danger of unfair prejudice did not substantially outweigh the probative value of the evidence.

CHAPTER 7

General Evidence

7.6 Former Testimony of Unavailable Witness

On page 364, after the April 2004 update, insert the following text:

Crawford v Washington, 541 US ____ (2004), applies retrospectively to cases pending on appeal when *Crawford* was decided. *People v Bell*, ____ Mich App ____, ____ (2004).

November 2004

Update: Traffic Benchbook— Revised Edition, Volume 1

CHAPTER 3

Misdemeanor Traffic Offenses

Part E—Other Misdemeanors Found in the Michigan Vehicle Code

3.46* Reckless Driving

A. Applicable Statute

On page 3-57, replace the content of this subsection with the following:

MCL 257.626(1) and (2) provide:*

“(1) A person who drives a vehicle upon a highway or a frozen public lake, stream, or pond or other place open to the general public, including, but not limited to, an area designated for the parking of motor vehicles, in willful or wanton disregard for the safety of persons or property is guilty of reckless driving.

“(2) A person who violates subsection (1) is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than \$500.00, or both.”

C. Criminal Penalties

On page 3-58, replace the content of this subsection with the following:

MCL 257.626(2) provides for:

- Imprisonment for not more than 93 days; or
- Fine of not more than \$500; or
- Both.

*Renumbered
by October
2003 update.

*Effective
November 1,
2004, 2004 PA
331 increased
the penalties for
reckless
driving.